IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 02.11.2006

CORAM

THE HON'BLE MR.JUSTICE K.MOHAN RAM

S.A.No.425 of 1994

Sambandasamy Mudaliar ... Appellant/Defendant

Vs.

1. M.Anbu Ammal(died)
2. Manickam
3. Ramarajan (Minor rep by father and guardian Manickam)
(Respondents 2 and 3 are brought on record as the Legal representatives of the deceased sole respondent and 2nd respondent appointed as guardian of the Minor 3rd respondent vide order dated 03.07.1996 in C.M.P.No.12875 to 12877 of 1995) ... Respondents

Second Appeal filed u/s 100 CPC against the Judgement and decree passed on 29.07.1993 in A.S.No.54 of 1992 on the file of the Principal District Judge at Pondicherry reversing the Judgement and decree passed in O.S.No.255 of 1989 dated 01.04.1991 on the file of the Principal Sub Judge, Pondicherry.

For Appellant : Mr.E.V.Venkataraman for
Mr.M.S.Subramanian
For Respondents : Miss.K.Veena for
Mr.T.R.Rajaraman

JUDGEMENT

The defendant in O.S.No.255 of 1989 on the file of the Principal Subordinate Court, Pondicherry is the appellant in the above second appeal.

2. For the sake of convenience, the parties are referred to as per their ranking in the suit.

3. The briefs facts are as follows:

The plaintiff has filed the suit for recovery of a sum of Rs.15,000/-. It is the case of the plaintiff that on 01.10.1986, a sum of Rs.15,000/- was advanced by her as loan to the defendant for the purpose of meeting his business expenses and to construct the house and the defendant executed the suit promissory note, Ex.A.1, undertaking to repay the amount with interest at 24% per annum. Since the defendant in spite of repeated demands failed to discharge the loan, the suit has been filed.

https://hcservices.ecourts.gov.in/hcservices/

4. The defendant contested the suit inter alia, contending that he neither received Rs.15,000/- as alleged by the plaintiff nor executed the

suit promissory note and contended that the plaintiff's husband was working as a broker with him in various business transactions and he used to get the signatures on plain stamp affixed papers as security and he never borrowed any amount from the plaintiff and due to misunderstanding that developed between them in their business dealings, the plaintiff taking advantage of the signatures on plain stamp affixed papers, has fabricated the promissory note.

5. The Trial Court framed the following issues:

(1) Whether it is true that the suit promissory note is a fabricated one and no consideration was passed under it?

(2) To what relief the plaintiff is entitled?

6. During trial, the plaintiff's husband Manickam was examined as P.W.1 and another witness was examined as P.W.2 and Ex.A.1 to A.4 and X.2 were marked on the side of the plaintiff. The defendant was examined as D.W.1 and another witness was examined as D.W.2 and Ex.B.1 to B.3 were marked on the side of the defendant.

7. On a careful consideration of the oral and documentary evidence adduced in the case, the Trial Court dismissed the suit. Being aggrieved by that, the plaintiff filed an appeal in A.S.No. 54 of 1992 on the file of the Principal District Judge at Pondicherry. The appeal was allowed. Being aggrieved by that, the defendant has filed the above second appeal.

8. The second appeal has been admitted on the following substantial questions of law:

(1) Whether the lower appellate court went wrong in placing reliance on Ex.X1?

(2) Whether the lower appellate court has wrongly placed the burden on the defendant?

9. Heard Mr.E.V.Venkataraman, learned counsel appearing on behalf of the appellant and Miss.Meena, learned counsel appearing on behalf of the respondents.

10. Though elaborate arguments were advanced by the learned counsel for the appellant regarding the alleged fabrication of the suit promissory note, the context in which the defendant had handed over the signed blank stamp papers etc., In my considered view, all these submissions are not necessary to be dealt with for the following reasons:

11. The Trial Court, by referring to the following suggestions put to D.W.1 and his answers to the same during cross-examination viz., "One Palani Gramany had filed a suit against me and P.W.1 for recovery of money, the suit was in respect of recovery of Rs.15,000/-, which was given to me by Palani Gramany in respect of the land of P.W.1, Palani Gramany entrusted that amount to me, pending resolution of a dispute between him and P.W.1, I came and gave evidence in this court and I paid Rs.15,000/- to P.W.1, the suit was decreed in favour of Palani Gramany against D.W.1 only. I deny the suggestion that I utilized the said Rs.15,000/- for construction of the building and in lieu of the same I myself prepared the suit promissory note, Ex.A.1 in favour of P.W.1's wife and Ex.A.1 and delivered it to P.W.1.", felt the necessity to consider the relevant evidence relating to the earlier suit filed by the said Palani Gramany. Ex.B.3 is the certified copy of the Judgement dated 19.9.1989

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

passed in O.S.No.679/1986 which has been marked with consent. Before considering Ex.B.3, the Trial Court observed that as the defendant admitted his signature in Ex.A.1, undoubtedly, the burden lies on him to disprove the contents of it and then proceeded to consider the oral evidence and Ex.B2, savings Bank pass book of the defendant and on the consideration of the same, recorded the finding that there was no necessity for the defendant to borrow the sum of Rs.15,000/-from the plaintiff.

12. The Trial Court, on a consideration of Ex.B.3 and the above said suggestion put to the defendant during his cross-examination, came to the conclusion that the sum of Rs.15,000/- as per Ex.A.1 has figured in Ex.B.3 Judgment and the court has also observed that the defendant herein, who was D.1 in those proceedings had already returned Rs.15,000/-to P.W.1, the husband of the plaintiff in the suit who had figured as second defendant in the earlier suit and P.W.1 herein also indemnified through a bond Ex.B.1 marked in Ex.B.3 proceedings to shoulder the responsibilities to the plaintiff therein. Undisputedly, no appeal has been preferred against Ex.B.3, Judgement and as such the said judgement is binding on the parties.

13. In view of the above, the Trial Court came to the conclusion that the so called retention of the sale proceeds of Rs.15,000/- by the defendant herein and for which only Ex.A.1 was executed by him is not true and Ex.A.1 is only a concocted document and cannot be enforced in law.

14. Learned counsel for the appellant submitted that the above said finding of the Trial Court is based on the documentary evidence and supported by acceptable reasons, but the lower Appellate Court has not considered the same and the lower Appellate Court has also not given any acceptable reasons to reverse that finding. He further contended that since the lower Appellate Court has not given reasons for disagreeing with the reasons of the Trial Court, the Judgement of the lower Appellate Court is liable to be set aside.

15. In paragraph 7 of the Judgement, the Lower Appellate Court has observed as follows:

> "It is this previous transaction which are clearly extracted from evidence before trial court as follows at page 4: D.W.1 says "one palani Gramani filed a suit against me and P.W-1 for recovery of Rs.15,000/-. That suit was decreed in favour of Palani Gramani against P.W-1". From the above evidence it is clear that D.W-1's liability has been loaded on plaintiff (P.W-1). In the light of the above findings, it is clear that the suit document Ex.A-1 is duly supported by consideration and that the respondent/defendant has not discharged the burden of proof for failure of consideration."

16. A reading of the above said observation of the Lower Appellate Court clearly shows that it is patently erroneous and it is against the finding recorded in the previous suit in the Judgement marked as Ex.B.3. In EX.B.3, it is observed as follows:

https://hcservices.ecourts.gov.in/hcservices/

> "Undisputedly D.2 received back Rs.15,000/- from D.1 as vouchsafe through Ex.B.1 dated 12.11.1985, and the former further guaranteed under the said document that he will be held

responsible for any action in respect of the said sum against D.1. Therefore, it is D.2, that has to pay Rs.8,500/- with interest to the plaintiff. Accordingly the issue is answered."

17. Thus, when it has been decided by the competent court by Ex.B.3, Judgement that the second defendant in that suit (P.W.1-husband of the plaintiff in this suit) had received back Rs.15,000/- from the first defendant in that suit, (the present defendant), the lower Appellate Court, without properly understanding the same has erroneously held as if the present defendant, as the first defendant in that suit had not returned the sum of Rs.15,000/- to the husband of the plaintiff who was the second defendant in the earlier suit. It is clear that the finding of the lower Appellate Court regarding the consideration for Ex.A.1 is patently erroneous and perverse. On the basis of Ex.B.3 and after considering the evidence in detail, the trial Court has recorded the finding that Ex.A.1 is not supported by consideration, but the lower Appellate Court misdirected itself in considering other unnecessary and insignificant aspects and erroneously reversing the well considered Judgement of the trial Court. As rightly pointed out by the learned counsel for the appellant, the lower Appellate Court has erred in placing reliance on Ex.A.1 and erred in wrongly placing the burden on the defendant.

18. Learned counsel for the respondents by relying upon the decision of the Supreme Court reported in 1999 (3) SCC P.35(BHARAT BARREL & DRUM MANUFACTURING COMPANY Vs. AMIN CHAND PAYRELAL) submitted that since the defendant has admitted his signature in Ex.A.1, it should be taken that the execution of promissory note is accepted and as such a legal presumption in favour of the plaintiff is raised and it is for the defendant to rebut the same by acceptable evidence, but in this case the defendant has failed to discharge that burden. The above decision of the Supreme Court, in my considered view, does not support the case of the defendant but it supports the case of the plaintiff. In the said decision, the Supreme Court observed as follows:

> The third principle that has to be borne in mind is the one that when both parties have led evidence, the onus of proof, loses all importance and becomes purely academic. Referring to this principle, the Supreme Court stated in Narayan Bagwantrao Gosavi Balajiwale v. Gopal Vinayak Gosavi as follows:
>
> "The burden of proof is of importance only where by reason of not discharging the burden which was put upon it, a party must eventually fail. Where, however, parties have joined issues and have led evidence and the conflicting evidence can be weighed to determine which way the issue can be decided, the abstract question of burden of proof becomes academic."
>
> We have referred to these three principles as they are important and have to be borne in mind by the court while deciding whether the initial 'evidential burden' under Section 118 of the Negotiable Instruments Act has been discharged by the defendant and the presumption 'disappeared' and whether the burden has shifted and later whether the plaintiff has discharged the 'legal burden' after the same was restored.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Once both parties have adduced evidence, the court has to consider the same and the burden of proof loses all its importance.

Before leaving the discussion on these aspects we would like to make it clear that merely because the plaintiff comes forward with a case different from the one mentioned in the promissory note it will not be correct to say that the presumption under Section 118 does not apply at all. In our view, the presumption applies once the execution of the promissory note is accepted by the defendant but the circumstance that the plaintiff's case is at variance with the one contained in the promissory note or the notice can be relied upon by the defendant for the purpose of rebutting the presumption and shifting the evidential burden to the plaintiff who has also the legal burden."

19. Though the above said law laid down by the Supreme Court is applicable to the facts of the case, it has to be held that since both the parties have adduced evidence, the Court has to consider the same and the burden of proof loses all its importance. Learned counsel for the respondents submitted that the proof pertaining to Ex.B.3, Judgement was not pleaded by the defendant in his written statement and as such, on the basis of some suggestion put to the defendant in cross-examination, it cannot be held that the plaintiff has changed his case. The said submission is liable to be rejected as Ex.B.3 has been marked as a document with consent and it is a certified copy of the Judgement rendered in the previous suit, to which the plaintiff, P.W.1 and the present defendant were parties and which has got material bearing on the issue to be decided in this case. As observed by the Apex Court in the above decision, in this case, the plaintiff's case regarding consideration is at variance with the one contained in the promissory note, as is evident from the suggestion put to D.W.1 in his cross-examination and the same can be relied upon by the defendant for the purpose of rebutting the presumption and shifting the evidential proof on to the plaintiff, who also has a legal burden. Since as pointed out above it is evident from Ex.B.3 that the defendant in this suit had repaid a sum of Rs.15,000/- to P.W.1, the husband of the plaintiff, who was the second defendant in the earlier suit, the plaintiff can lead no other evidence to prove that consideration had passed under Ex.A.1.

20. For the above said reasons, the substantial questions of law are answered in favour of the appellant and the second appeal is accordingly allowed. However, there will be no order as to costs.

21. At this stage, learned counsel for the appellant submits that in compliance of the order dated 03.07.1996, passed in C.M.P.No.6447/1995 in the above appeal, the appellant had deposited a sum of Rs.12061/- to the credit of O.S.No.255/89 on the file of the Principal Subordinate Court, Pondicherry and the same has been withdrawn by the respondents herein and hence the learned counsel submits that the respondents are liable to repay the same to the appellant with interest at 9% from the date of withdrawal of the amount. When the appellant has succeeded in the above appeal and when the respondents had the benefit of enjoying the said amount, it is just and proper, that the respondents should be directed to refund the said amount with interest at the rate of 9% per annum.

WEB COPY
https://hcservices.ecourts.gov.in/hcservices/

Accordingly, the respondents shall repay the said amount of Rs.12,061/- with interest at 9% per annum from the date of withdrawal within a period of eight weeks from the date of receipt of a copy of this Judgement.

kua

Sd/-
Assistant Registrar

/true copy/

Sub Assistant Registrar.

To

1. The Principal District Judge, Pondicherry
2.The Principal Sub Judge, Pondicherry
+ One cc to Mr. T.T. Rajaraman Advocate SR 52079
+ One cc to Mr. M.S. SubramanianAdvocateSR 51888.
TEJ (co)

sg 09/01/07

S.A.No.425 of 1994
02.11.2006

HIGH COURT OF JUDICATURE MADRAS
सत्यमेव जयते
WEB COPY

https://hcservices.ecourts.gov.in/hcservices/